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Supreme Court, U.S.
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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LAWRENCE WAYNE GARTH
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

In a national class action involving an estimated 250,000 American farmers, the United States District Court for North Dakota ruled that certain policies and practices of the Farmer's Home Administration (FmHA) violated the farmer/borrower's constitutional rights to due process, Coleman v. Block, 580 Fed Sup., 194 (D.N.D. 1984). The Coleman case resulted in a nation-wide injunction preventing the FmHA from "freezing" the "income stream" of farmer/borrowers and thereafter refuse to allow the farmer to pay necessary farm operating and family living expenses from crop proceeds. Petitioner was prosecuted under 18 U.S.C. § 658 when he sold his crops in the ordinary course of business and used the income to pay necessary farm operating and family living expenses.

The question presented is whether the FmHA may prosecute a farmer/borrow-

er for continuing to utilize his "income stream" to pay necessary farm operating and family living expenses when, under the same circumstances, the FmHA may not, without violating the borrower's constitutional rights to due process, "cut-off" the farmer's income, foreclose or otherwise prevent the farmer from paying necessary farm operating and family living expenses.

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vs.
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 773 Fed. 2d 1469 (5th Cir. 1985).

JURISDICTION

The judgment of the Court of Appeals was entered on October 8, 1985. On December 11, 1985, an order extending time to file petition for writ of certiorari was issued. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes and Constitutional provisions involved in this case are as follows:

The Fifth Amendment, United States Constitution, which provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except for cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put to jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use,

without just compensation."

The statute under which petitioner was prosecuted was 18 U.S.C. § 658, which provides as follows:

"Whoever, with intent to defraud, knowingly conceals, removes, disposes of, or converts to his own use or to that of another, any property mortgaged or pledged to, or held by, the Farm Credit Administration, any Federal intermediate credit bank, or the Federal Crop Insurance Corporation, Farmers Home Administration, any production credit association organized under §§ 1131-1134m of Title 12 (12 U.S.C. §§ 1131-1134m), any regional agricultural credit corporation, or any bank for cooperatives, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the value of such property does not exceed $100, he shall be fined not more than $1,000

or imprisoned not more than one year, or both."

STATEMENT OF THE CASE

Petitioner Wayne Garth is a 63-year old West Texas farmer who raises hybrid seed and cattle. In 1978, the counties where Wayne Garth farmed were declared disaster areas. Petitioner was forced to turn to the Farmers Home Administration (FmHA) for emergency loans to enable him to continue his farming operation. In 1979, the FmHA refinanced Wayne Garth's long-term debt and loaned the petitioner the dollars necessary to allow him to finance his 1979 crops. In exchange for FmHA financing, the petitioner executed security agreements covering his crops, then or thereafter planted, and all livestock, then owned or thereafter acquired. In 1980, Wayne Garth repaid his annual operating loan in full and applied for and was given an operating loan for the crop year

1980-1981.

During the 1979-1981 crop years, Wayne Garth sold his crops when harvested, paid necessary farm operating and family living expenses, and applied the balance to his operating loan with the FmHA. At the end of 1980, Wayne Garth was notified that the FmHA would not finance his 1981-1982 crops, and that Wayne would no longer be allowed to pay any expenses from the proceeds of his crop sales but would be required to apply all of the proceeds to his outstanding loans. Despite the unilateral and constitutionally suspect decision of the FmHA to deny financing and freeze Wayne Garth's income stream, Wayne continued to pay necessary farm operating and family living expenses from the proceeds of his annual crops.

In February, 1984, following a preliminary injunction issued in November,

1983, the U.S. District Court for the District of North Dakota, in a national class action, enjoined the FmHA from unilaterally commencing the liquidation process and freezing the farmer/borrower's "income stream" without first providing the farmer/borrower notice of and an opportunity to present evidence on his behalf prior to the decision to liquidate and freeze income. The District Court concluded that FmHA procedures to the contrary did not comport with basic procedural due process. Coleman v. Block, 580 F. Supp 194 at 208 (D.N.D. 1984).

On August 16, 1984, Wayne Garth was indicted for violating 18 U.S.C. §§ 658 and 2. The government alleged that the petitioner, on various dates between October, 1980 and September, 1981, did, with intent to defraud the FmHA, knowingly dispose of or cause to be disposed of or convert to his own

use property mortgaged to the FmHA as security for a loan which loan and mortgage were, on the date of the alleged disposal or conversion, outstanding with a valid lien existing in favor of the FmHA. Section 2 alleged that the acts were done in conspiracy with his son, who remained unnamed in the indictment.

The case proceeded to trial by jury on December 7, 1984. The jury returned a verdict of guilty on all five counts and judgment was entered on February 22, 1985, sentencing the defendant to two years on each count, which sentences were to run concurrently. Garth appealed his conviction which was affirmed by the Fifth Circuit which decision is the subject of this petition. (Appendix A)

REASONS FOR GRANTING THE WRIT

This case presents an issue of vital importance to thousands of American farmers who are caught in the throes of an agricultural crises of major proportion. 18 U.S.C. § 658 is a federal criminal statute applicable only to farm borrowers.

When a farmer enters into a loan agreement with the FmHA, he develops, along with the county supervisor, a farm and home plan. This farm and home plan describes the crops to be grown, the expenses that are anticipated and the sources of funds to pay the expenses. The plan further allows, by agreement, that under certain circumstances, the crops may be sold and the proceeds used to pay ordinary operating and family living expenses. As stated in Coleman, when the FmHA

decides to liquidate a farmer, they characteristically cut off and cancel previously agreed to releases and insist that the farmer not sell any crops without turning all of the proceeds to the FmHA. This has been described by Judge Van Sickle in the Coleman case as a "starve out," in that while the farmer is appealing the administrative decision to terminate his loans and foreclosure, he is, in effect, being driven out of business, depriving him of any effective appeal. Coleman at 203. If the farmer chooses to operate on a normal basis (i.e., to market his crops in the ordinary course of business and to pay his farm operating expenses), he is subject to and will likely be prosecuted under 18 U.S.C. § 658.

In the instant case, the Fifth Circuit below acknowledged that Garth was a member of the protected class in Coleman v. Block and that Coleman v.

Block was controlling law in the Fifth Circuit (United States v. Nolder 749 Fed. 2d. 1128 (5th Cir 1984)), but failed to see how membership in the class provided him any protection against criminal prosecution under 18 U.S.C. § 658. (Appendix A) It is this conclusion that is in conflict with prior decisions of this court. As stated by the court in Coleman, "the debtor who now receives nothing towards support of his family from his efforts must care for the animals and the crops on the place, let them starve or waste, or "voluntarily" sell out."

THE COURT OF APPEALS DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT

The Fifth Amendment of the United States Constitution has been consistently interpreted by this court to prohibit the deprivation of life, liberty or property without due process of law. This prohibition applies to the federal

government and is a substantive limitation on the government's power.

The Fifth Circuit's decision in this case found no relationship between Garth's criminal prosecution and the FmHA's decision to unilaterally cut off and freeze his income stream in violation of his constitutional rights. (Appendix at 7) In Camara v. Municipal Court, 387 U.S. 523 (1967), this court determined that failure to permit another to intrude upon the constitutional protection against unreasonable searches, may not be made criminal. As an example, the court found that one may not be convicted for refusing entry to a building by a fire inspector who is neither acting in an emergency nor armed with a search warrant.

It would be inconsistent then to allow that a farmer may be convicted for selling his crops and paying farm

expenses when the FmHA may not constitutionally and unilaterally prevent such activity. In other words, Wayne Garth cannot be convicted for refusing to allow the FmHA to unconstitutionally freeze his income stream and deprive him of the fruits of his labor and/or due process. (See Goldberg v. Kelly, 397 U.S. 254 (1970), where this court held that welfare benefits were property and that a would-be depriver of those benefits had to comply with all of the due process requirements before any decrease or curtailment of those benefits were made.) In the instant case, the FmHA, as established by the facts of this case and as determined by Judge Van Sickle in Coleman v. Block, supra, without notice or opportunity to be heard, refused financing and thereafter froze the borrower's income stream.

As the court stated in Coleman, supra, the farmer's interest in his pro-

duce is as real as that of the worker's interest in his wages. See Sniadach v. Family Corp., 395 U.S. 337 (1969). "There is deeply embedded in the law and the Uniform Commercial Code reflects a distinction between farm products on the one hand and equipment and inventory on the other hand. This difference, although not precise, is important because it points us toward a fundamental element of our social thinking, i.e., the biblical injunction that "a laborer is worthy of his hire." The "hire" of the farm operator is basically the crop he raises whether it be a crop of produce for commerce (wool), produce for animal use (hay), or produce for human use (vegetables or fruit)." Coleman at 207.

CONCLUSION

The Fifth Circuit's opinion below acknowledges no relationship between

the civil determination that the FmHA's action in freezing Wayne Garth's income stream violated his rights of due process and Wayne Garth's subsequent criminal prosecution. This decision has the effect of allowing the farmer to be deprived of his freedom under circumstances that would not allow the deprivation of his property.

It is not consistent or tolerable to assign a lesser standard of due process and individual rights to the deprivation of freedom than to the deprivation of property. There would have been no alleged criminal activity had not the government unilaterally and without due process frozen Wayne Garth's income stream.

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for

the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LAWRENCE WAYNE GARTH,
Defendant-Appellant.

No. 85-1126
OPINION

Filed October 8, 1985

Before:

Goldberg, Jolly and Higginbotham,
Circuit Judges.

Opinion by Judge Goldberg

Appeal from the United States
District Court
for the Northern District of Texas
Mary Lou Robinson, District Judge,
Presiding

SUMMARY

Criminal Law/Criminal Procedure

Appeal from conviction of conversion of grain sorghum, cattle and wheat in violation of 18 U.S.C. §§ 658 and 2. Affirmed.

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UNITED STATES V. GARTH

Garth is a farmer who was saddled with losses from a drought and other debts. The Farmers Home Administration (FmHA) approved a loan which was evidenced by four promissory notes. Garth also signed a security agreement pledging crops and livestock as security. Later, Garth made sales of his milo seed crop without reporting to the FmHA either the sale or the disposition of the proceeds. His son made similar dispositions of cattle and wheat. On appeal, Garth raises several grounds of error.

(1) Although Garth is a member of the class protected in Coleman v. Block, 580 F. Supp. 194 (D.N.D. 1984), his membership does not protect him against criminal prosecution because Coleman merely enjoins the government from ignoring class members rights under a distinct civil law. (2) Garth argued

that the government is estopped from prosecuting him because the FmHA had consented to his conduct. (3) An audit report of FmHA practices which Garth attempted to introduce to support his argument that the FmHA consented to his conduct, was neither admitted nor offered at trial, and thus is subject to the government's motion to strike. (4) There is no evidence in the record that the FmHA consented to Garth's conduct. (5) Nor is there evidence to support Garth's assertion that even though he failed to report the disposition of the proceeds, he used them for necessary farm expenses and that this practice was authorized by his supervising officials. (6) The use of estoppel against the government is not appropriate here. Even if the test for estoppel were adopted here, it would be difficult to conclude that the public's interest would not be unduly damaged by the imposition

of estoppel.

(7) Under the test for vagueness, the statute gave Garth more than fair notice that the sale of the collateral for his loans from FmHA and the subsequent conversion of the proceeds to his own use would place him in violation of the statute. (8) Garth also failed to make out a claim of selective prosecution.

(9) The district court did not abuse its discretion in refusing to admit certain documents because Garth was proceeding under an incorrect legal assumption, and that which the documents tended to prove was irrelevant.

The evidence was sufficient to support the convictions. (10) The property cited in the indictment was mortgaged to the FmHA. (11) The evidence is

sufficient to convince a rational trier of fact that Garth converted the milo with intent to defraud the FmHA. (12) As to the cattle, Garth was indicted under 18 U.S.C. § 2, which punishes as principals those who aid or abet the commission of offenses against the United States. Although the actual cattle sales were made by Garth's son, a rational trier of fact could have decided from the evidence presented that Garth had participated in the sales. (13) More than ample evidence supported the conviction for converting grain under count six. (14) Finally, the record contains independent evidence that adequately corroborates the truth of Garth's admissions.

OPINION

GOLDBERG, Circuit Judge:

Emerson once wrote that "(t)he farmer is covetous of his dollar, and with reason. It is no waif to him. He knows how many strokes of labor it represents. His bones ache with the day's work that earned it." [1] In the years since Emerson penned these words, air-conditioned combines have in most instances replaced horse and harness, but farmers, like any other workers in a troubled industry, remain covetous of their dollars.

In this case, the jury found in essence that appellant's covetousness of the dollar exceeded the bounds of criminal law. In particular, the jury found appellant Lawrence Wayne Garth

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[1] Conduct of Life. Wealth.

guilty of five counts[2] of conversion, in violation of 18 U.S.C. §§ 658 and 2.[3] All five counts alleged the conversion to his own use of property mortgaged to the Farmers Home Administration ("FmHA"). Count 1 charged Garth

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[2]The original indictment contained six counts. On the government's own motion, the trial court dismissed Count Five.

[3] U.S.C. §658 reads in pertinent part:

> Whoever, with intent to defraud, knowingly conceals, removes, disposes of, or converts to his own use or to that of another, any property mortgaged or pledged to, or held by...the Secretary of Agriculture acting through the Farmers' Home Administration... shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the value of such property does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. §2 reads:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

with the conversion of 10,000 cwt. of grain sorghum; Counts 2, 3, and 4 charged the conversion of 15, 8, and 98 head of cattle respectively; and Count 6 charged him with the conversion of 136 bushels of wheat. The district court sentenced Garth to two years in prison on each of the five counts, which sentences were to run concurrently.

Appellant raises five grounds of error: (1) that his conviction violates his constitutional right to equal protection of the laws and due process; (2) that 18 U.S.C. § 658 is void for vagueness; (3) that the government had impliedly consented to his conduct and is therefore estopped from prosecuting him; (4) that the trial court erred in refusing to admit defendant's proffered exhibit 10; and (5) that the evidence at trial is insufficient to support his conviction. Finding all five arguments

meritless, we affirm.

I. Factual and Procedural Background

Wayne Garth is a farmer who raises cattle and hybrid seed on over 3,000 acres near Dumas in the Texas Panhandle. In 1978 the counties where Garth farmed were declared disaster areas due to drought. Saddled with losses from the drought and other debts, Garth applied to the FmHA for a $400,000 economic emergency loan in September, 1978. Charles Taylor, then FmHA county supervisor in Amarillo and a witness for the government at trial, recommended that Garth withdraw his application. Taylor had concluded that Garth's outstanding debts would limit his ability to repay the loan.

Garth then refiled in December, 1978 for emergency loans, which, after another assessment of his farming operations and his ability to pay, the FmHA

approved for the sum of $1,650,640.00. [4]

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[4] While it may at first seem odd that after being refused a $400,000 loan Garth then received a loan four times that size, the explanation lies in the difference between the economic emergency loan program and the emergency loan program. In the latter, FmHA has far greater flexibility to step in and restructure the farmer's debt to facilitate repayment.

Charles Taylor testified that the FmHA had the authority under the emergency loan program to do several things that were not possible under the economic program: "Number one, the maximum loan (limit) under Economic Emergency Loan was $400,000. Based on his outside other indebtedness, his total cash flow structure, if we had made him the $400,000 loan he still would have all his other substantial indebtedness due and he had limited repayment ability because some of them were past due, some of them were delinquent, some of them were coming due in the very near future. With using the Emergency Loan authorities we were able to make him a larger loan, a million six roughly, whereby we were able to come in and completely restructure the overall debt situation. By doing this and giving him extended repayment terms that he did not have the benefit of based on these other creditors we were able to show that he did have repayment ability. But only by our loaning these funds to refinance all these other creditors. We took him from a negative cash flow position to a positive cash flow position: something that he could show that he could live with." Tr. at 79.

The loan was evidenced by four promissory notes, all dated June 19, 1979. The first loan was in the amount of $95,130, payable over twenty years at three percent interest. This loan covered actual production losses from the drought. The second loan was for $169,520, payable over seven years at eight-and-one-half percent interest. This loan was a major adjustment emergency loan to restructure chattel-type debt. The third loan was also a major adjustment emergency loan, but it restructured real estate-type debt. It was for $873,090, payable over forty years at eight-and-one-half percent interest. The fourth loan was an annual operating loan for the purpose of financing Garth's projected operating expenses for 1979. It was for $512,900, payable in one year at eight-and-one-half percent interest. To pay for his 1980 operating expenses, FmHA loaned

Garth $623,400 on June 19, 1980, payable in one year at fourteen percent interest. Apparently, Garth has paid in full only the loan for $512,900.

On June 19, 1979, Garth signed an agreement that secured all four notes and any future indebtedness to FmHA. The security agreement provided that Garth's crops, then or thereafter planted, and all livestock, then owned or thereafter acquired would secure the four notes and any future notes. No new security agreement was made for the 1980 loan of $623,400.

Garth's course of misconduct began on October 26, 1980, when he sold his seed milo crop to Advanced Quality Seed Company, of which he was a partner, without reporting to FmHA the sale or the disposition of the proceeds. Only after Weldon Rainey, who succeeded Tay-

lor in supervising Garth's account, had written to Garth on July 9 and July 17, 1981 about the crop did Garth bring in the settlement sheets for those sales. When Garth did not account for the milo proceeds, Rainey reported the conversion of the milo on August 4, 1981. The milo crop was valued at $100,184. These facts form the basis of Count 1.

The cattle sales that form the basis of Counts 2, 3, and 4 took place in February, March, and April of 1981. Mike Garth, Wayne Garth's son and a partner with his father in Garth and Garth Cattle Company, made the sales to and received the checks from the Texhoma Livestock Commission. Mike Garth sold 15 head of cattle on February 4 for $5,565.86, 8 head of cattle on March 5 for $2,302.13, and 98 head of cattle on April 30 for $23,501.79. Al-

though Wayne Garth had accounted for the proceeds from many previous cattle sales, he did not turn over the proceeds from these sales, nor did he offer any explanation to Rainey when asked about them.

The last act for which the jury found Garth criminally responsible was the conversion of 136 bushels of wheat worth $493.68. Mike Garth sold 181.33 bushels of wheat to Moore County Grain Handling Company in Dumas, Texas, of which his share was 136 bushels. The check from the Grain Handling Company, although payable to Mike Garth, was deposited in Wayne Garth's account on July 13, 1981.

After Rainey had drawn up evidence of conversion, the Office of Inspector General, United States Department of Agriculture, sent special agent Allen

Poff to investigate. On May 11, 1982, Poff interviewed Garth at his home regarding the milo, wheat, and cattle sales. Poff reduced the conversation to a written statement and returned on May 13, at which time Garth signed the statement. During the conversation, Garth admitted that he had sold the cattle which later formed the basis of Counts 2, 3, and 4, and that he had not given the proceeds to FmHA. Garth also admitted that he had not turned over to FmHA the proceeds from either the sale of the 1980 seed milo crop or the wheat sale to the Moore County Grain Handling Company.

Garth was indicted August 16, 1984, and trial began on December 7, 1984. The defense conducted its case through cross-examination of the government's witnesses, but it did not call any witnesses of its own. The jury returned

guilty verdicts on all five counts on December 13, and on January 16, 1985, the trial judge denied defendant's motion for judgment acquittal or, in the alternative, for a new trial. Garth was sentenced on February 22, 1985, and timely noticed his appeal that same day.

II. The Merits

A.

(1) Garth asserts as his first point of error that, because he is a member of the Plaintiff class in Coleman v. Block, 580 F.Supp. 194 (D.N.D. 1984), that decision bars the government from prosecuting him, and the trial court erred therefore in failing to dismiss the charges. Coleman held that FmHA appeal regulations governing foreclosures

did not comport with due process, id. at 203, and enjoined the FmHA, among others, from foreclosing on secured property without adequate notice and hearing. Id. at 211.[5]

Although we can safely conclude that Garth is a member of the class thus protected, see United States v. Holder, 749 F.2d 1128, 1130 (5th Cir. 1984), we fail to see how his membership provides him any protection against a criminal prosecution under 18 U.S.C. §658. Coleman does not speak in any manner, shape, or form -- by any verb, noun, adverb, adjective, or otherwise -- to indicate that it was dealing with any criminal statute. The relief sought and the issues considered were of a wholly civil nature. The only restric-

[5] For a dramatization of the problems Coleman sought to address, see Country (R. Pearce dir. 1984).

tion that the court placed on the government in cases of criminal conversion was the requirement that the borrower "be afforded an opportunity to apply for deferral (of the loan) under 7 U.S.C. §1981a." Id. at 211. This restriction in no way alters the class members' rights under the criminal law, but merely enjoins the government from ignoring class member rights under a district, civil law. In effect, Garth asks us to read Coleman as having decriminalized behavior prohibited by 18 U.S.C. 658. Coleman did nothing of the sort, nor could it have done so.

B.

(2) The defendant next argues that the government is estopped from prosecuting him because FmHA officials had consented to his conduct. In support of this argument, Garth claims that

the "evidence at trial established that it was a 'customary practice' to allow appellant and other FmHA borrowers to sell and dispose of crops and livestock and then report the same after the fact." Appellant's Brief at 20. Garth has also directed our attention to an audit report of FmHA practices by the office of the Inspector General of the Department of Agriculture.[6] The report, based on a sample of 202 cases nationwide, concluded that the "lack of legal action against known cases of improper dispositions contributes to the impression of implied consent held by many FmHA borrowers as well as the general public." Record Excerpts at 54.

(3) This audit report is subject to the government's motion to strike,

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[6] Audit Report No.04638-2-At, Record Excerpts, 50-55.

which we now grant for the following reasons. The report first appeared in the Defendant's Record Excerpts, well after trial. It was neither admitted nor even offered at trial. The defendant argues in effect that the report, rather than proving facts asserted, constitutes some sort of quasi-legal finding, which, although not binding on us, somehow compels us to agree with its conclusions. The short answer to this argument is that the defendant has used the report as a post hoc attempt to strengthen the record on the factual question of implied consent. Moreover, had defendant offered the report, the trial court would not have abused its discretion by excluding it. On the record before the court, the report was irrelevant to the acts of the FmHA officials in this case.

(4) Thus, while the world according

to Garth contains the audit report, we are constrained by the record, and the record does not support Garth's contention that the government consented to his conduct. What the record supports is the fact that the FmHA officials with whom Garth dealt expected that when a debtor disposed of secured property, the debtor would report the proceeds of the sale within a few days of the sale.[7] Garth, however, never reported the disposition of the proceeds from the sale of the converted property. There is absolutely no evidence in the record that the FmHA officials consented to this conduct. Moreover, Garth's on-

[7] Charles Taylor testified that when a farmer sold his crops, the customary practice was for "him to report the proceeds of that sale within a reasonable period of time, like tomorrow or the next day or sometime within a few days. We don't mean for him to go out there and sell a secured piece of property today and then when he gets caught six months to a year later say, oh, now I want your permission to do that." Tr. at 124.

again, off-again reporting of the proceeds belies any assertion that the government's consent fully shaped his behavior.

(5) Garth then argues that even though he failed to report the disposition of the proceeds, he used those proceeds for necessary farm operating expenses, a practice that, he asserts, was authorized by his supervising officials. Once again, there is no evidence in the record to support this claim. Charles Taylor testified only that he allowed Garth to dispose of his 1978 milo crop in this way, on which the FmHA had no lien. Moreover, even had FmHA given its consent, there is no evidence that Garth used the proceeds solely for farm operating expenses.

Finally, even assuming that the government had consented to Garth's

use of unreported proceeds for farm operating expenses, that consent would not as a matter of law relieve Garth of his criminal liability. Like the Ninth Circuit, we "recognize the force of the proposition that estoppel should be applied against the Government with utmost caution and restraint....Indeed the tendency against Government estoppel is particularly strong where the official's conduct involves questions of essentially legislative significance, as where he conveys a false impression of the laws of the country." Schuster v. Commissioner of Internal Revenue, 312 F.2d 311, 317 (1962); see also, United States v. Thompson, 749 F.2d 189, 193 (5th Cir. 1984); Hicks v. Harris, 606 F.2d 65, 68-9 (5th Cir. 1979); cf. Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380, 384 (1947) ("anyone entering into an arrangement with the Government takes the risk of having

accurately ascertained that he who purports to act for the Government stays within the bounds of his authority").

(6) The Ninth Circuit has made estoppel available as a defense against the government "if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of the estoppel." United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973). Although we find it inappropriate to adopt this test here, we would nonetheless have difficulty concluding that the public's interest would not be unduly damaged by the imposition of estoppel. Lazy FC Ranch and the cases cited therein were civil matters in which the public's interest was far less than its interest

here in enforcement of the criminal law.[8]

We do not decide that estoppel against the government is never appropriate in a criminal case. The facts constituting the basis of an estoppel claim may go, as in this case, to the question of defendant's intent to defraud the government, in which case the question is one for the trier of fact. We have found nothing in this record that would compel us to abandon our

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[8] As the government remarked in its closing argument, "You got to trust people. And when they violate that trust they need to be prosecuted, because I tell you, you sit here throughout this whole trial and you look around and you don't see any victims sitting in here, you see the government. Now, isn't that a great victim. About like an insurance company. You see the government. Well, I will tell you who the government is and who is the victim of this crime. It is every honest farmer who tries to do the program right, who tries to take the money and get back on his feet where he can get financing at a bank...." Tr. at 487.

caution and restraint.[9]

Although it is apothegmatic, it is therapy to be reminded once in a while that we are a government of laws and not of persons. It is neither aphoristic nor platitudinous to say that this doctrine courses through the whole panoply of our constitutional structure. The concept is basic to the ideals of ordered liberty and the protection of the rights of people that formed the bedrock of our founding document and its basic

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[9] We are not the first. In United States v. Lott, 751 F.2d 717 (4th Cir. 1985), the defendant Lott received an advance of $50,000 for the sale of cotton that was pledged as security for a loan from the FmHA. He claimed that the FmHA had implicitly agreed to let him keep the $50,000 and for that reason could not claim that he had converted the property. The court disagreed, noting that "even if the F(m)HA did lead Lott to believe that it knew of the advance and implicitly acquiesced in his retaining the funds, this in no way absolved him of the crime of conversion." Id. at 719.

amendments. This is a prime illustration that no man or woman, however powerful he or she may be, can by fiat rewrite the law that arises from our legislative process and is guarded over and construed by our courts.

C.

In his third argument, Garth alleges that 18 U.S.C. § 658 is void for vagueness.[10] "To pass constitutional muster, a statute must give persons of ordinary intelligence fair notice that their contemplated conduct is forbidden by statute." United States v. Greene,

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[10] We note as a preliminary matter that Garth neither raised nor addressed this issue below. "Generally, we do not consider issues that were not raised before the district court unless our failure to do so would result in grave injustice, or unless the issue can be resolved as a matter of law or is otherwise beyond dispute." Callejo v. Bancomer, S.A., 764 F.2d 1101, 1117 n.20 (5th Cir. 1985). Because the issue of the statute's vagueness is a matter of law, we address it here.

697 F.2d 1229 (5th Cir. 1983). Garth argues first that the statute does not provide notice as to whom it is impermissible to defraud. We disagree. The statute under consideration has a positive pellucidity. It is capable of neither misunderstanding nor miscomprehension. Anyone with a nominal level of intelligence can understand the impact of the statute.

(7) We have no difficulty concluding that the statute gave Garth more than fair notice that the sale of the collateral for his loans from the FmHA and the subsequent conversion of the proceeds to his own use would place him in violation of the statute. Moreover, the clear intent of the statute is to protect from fraud the various government agencies listed, of which FmHA is one.

Garth also makes several other arguments under the rubric of his vagueness analysis. First, he claims that the statute does not "address the issue of whether permission to conceal, remove, dispose of or convert is a factor in determining whether a violation of section 658 occurred." Appellant's Brief at 28. The statement of this question provides its own answer. Statutes prohibiting murder are not void for vagueness merely because they fail to state that the murder victim's permission does not excuse the crime. In addition, this claim merely restates his estoppel argument, which we have already rejected.

(8) Second, Garth claims that the vagueness of the statute permits officials untramelled discretion in deciding whom to prosecute, which in turn leads to arbitrary and discriminatory enforcement.

We note first that this attack is not directed against the statute itself, but is rather directed against its administration. To make out a claim of selective prosecution, which is what this argument amounts to, Garth must first "make a prima facie showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not." United States v. Greene, 697 F.2d 1229, 1234 (5th Cir.), cert. denied, 463 U.S. 1210, 103 S.Ct. 3542 (1983). Garth has failed to meet this burden; there is no evidence in the record that he was either singled out or that others had committed the same acts. Even had he made such a showing, he would have stumbled on the second step of the claim, which requires a showing that the "prosecution has been invidious or in bad faith in that it rests upon such impermissible considerations as race, religion, or

the desire to prevent his exercise of constitutional rights." Id. No such showing has been made.[11]

D.

(9) Garth also complains that the district court erred in refusing to admit Defendant's proferred Exhibit 10, which consisted of documents that would have helped show that his 1979 operating loan had been paid in full. The district court sustained the government's objection on the ground that the defendant had failed to lay the proper founda-

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[11] While his conviction will prevent him from farming for two years, farming is not a constitutional right nor are farmers a suspect class. But hear, W. Jennings & W. Nelson, "Mamas Don't Let Your Babies Grow Up To Be Cowboys," on Waylon and Willie side 1, track 1 (1978) (noting that "Cowboys ain't easy to love, and they're harder to hold. They'd rather give you a song than diamonds or gold.").

tion for the exhibit by failing to show that the witness had any familiarity with the documents. We find that the district court did not abuse its discretion in refusing to admit the exhibit. Garth finds the exhibit relevant because it would provide the factual predicate for his argument that payment of the loan extinguished any security interest the government had in his crops and livestock. Because Garth was proceeding on an incorrect legal assumption,[12] it was irrelevant whether or not the loan had been paid off. The refusal of the district court to admit it is therefore at worst harmless error.

E.

In reviewing the sufficiency of the evidence to support a criminal convic-

[12] See pp. 17-19, infra.

tion, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original); United States v. Lerma, 657 F.2d 786, 789 (5th Cir. 1981), cert. denied, 455 U.S. 921, 102 S.Ct. 1279, 71 L.Ed.2d 463 (1982). All of the evidence must be considered in the light most favorable to the government, Jackson v. Virginia, supra, and we must accept all credibility judgments and reasonable inferences that support the verdict. United States v. Dean, 666 F.2d 174, 177 (5th Cir.). cert denied, 456 U.S. 1008, 102 S.Ct. 2300, 73 L.Ed.2d 1303 (1982). In addition, we note that "(t)he standard for review of the sufficiency of the evidence to support the convic-

tion is the same whether the evidence is direct or circumstantial." United States v. Hilburn, 625 F.2d 1177, 1180 (5th Cir. 1980) (citing Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954)).

In order to obtain a conviction under 18 U.S.C. §658, the government must prove three things: first, that Garth knowingly and wilfully disposed of, or converted to his own use, the property described in the indictment; second, that the property disposed of was mortgaged to the Farmer's Home Administration; and third, that Garth acted with intent to defraud the FmHA. We have no difficulty concluding that the government successfully carried its burden of proof.

To dispose of an issue common to all five counts, we address first Garth's

contention that the property disposed of was not mortgaged to the FmHA. Garth claims that his crops and livestock secured only the 1979 operating loan for $512,900, and that by paying off this loan in full, he extinguished any security interest the FmHA had in the property that formed the basis of the indictment. He bases this belief on a letter dated March 15, 1979, from W. H. Pieratt, the FmHA State Director, in which Pieratt lists crops and cattle as security for the operating loan only. Defendant's Exhibit 5(a).

(10) Were this letter the only evidence of a security agreement, we might be inclined to agree with Garth. However, on June 19, 1979, Garth signed a document with the heading "Security Agreement (Chattels and Crops)." Government's Exhibit 5. The agreement secured all four promissory notes signed

that same day, as well as future additional indebtedness, which would include the 1980 operating loan for $623,000.[13] As security, Garth pledged all crops, then

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[13] Relying upon 7 C.F.R. § 1941.57(d)(2)(i), Garth contends that the FmHA regulations required a new security agreement for new loans subsequent to the payment in full of a prior loan. We reject this argument because (d)(2)(i) applies only to initial loans, not subsequent loans. Had he read further, he would have encountered language that does not appear to require a new security agreement for subsequent loans if the prior agreement was executed more than one year after "the crops which are offered as security became growing crops." 7 C.F.R. §1941.57(d)(2)(ii)(B). Although the record is not clear on the point, both the 1980 seed milo crop and the 136 bushels of wheat may not have been growing one year from June 19, 1979. Nevertheless, these crops were still pledged as security for the other three long-term loans. Garth has pointed to nothing in the regulations, nor have we found anything, that would create the administrative nightmare involved in drawing up new security agreements every year for outstanding loans.

or thereafter planted.[14] and all livestock, then owned or thereafter acquired.[15] The record therefore supports the finding that the property cited in the indictment was mortgaged to the FmHA.

Count One

(11) Count One involved 10,000 cwt.

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[14] The security agreement pledged as security "(a)ll crops, annual and perennial, and other plant products now planted, growing or grown, or which are hereafter planted or otherwise become growing crops or other plant products (a) within the one-year period or any longer period of years permissible under State law, or (b) any time hereafter if no fixed maximum period is prescribed by State law...."

[15] The security agreement pledged as security "(a)ll livestock (except livestock and poultry kept primarily for subsistence purposes)..., now owned or hereafter acquired by Debtor, together with all increases, replacements, substitutions, and additions thereto...."

of seed milo. The evidence at trial showed that Garth was a partner with J.L. Ervin, Jr. in Advance Quality Seed and Grain, Inc., and that on October 26, 1980, Garth began to deliver to Advance Quality Seed a portion of his 1980 seed milo crop. Garth received payment for the milo by making withdrawals from the Advance Quality Seed's account. He continued to make withdrawals during 1981 until he had received full payment. Garth deposited most of the checks representing payment for the milo into his personal account at the First National Bank of Dumas. Only after Weldon Rainey, the county supervisor, had written Garth twice inquiring about the milo crop did Garth bring him the Advance Quality Seed settlement sheets. Rainey testified that Garth did not respond to his inquiry as to where the proceeds from the sale of the milo were. Special Agent Poff

testified that Garth had told him that he had sold the milo and had not given the proceeds to the FmHA. The evidence also showed that during this period, Garth had been reporting the disposition of his other secured property. We think the evidence is sufficient to convince a rational trier of fact that Garth converted mortaged property with intent to defraud the FmHA.

Counts Two, Three, and Four

The evidence supporting these counts shows that Mike Garth, Wayne Garth's son and partner in Garth and Garth Cattle Company, sold a total to 121 head of cattle to the Texhoma Livestock Commission Company, Inc., on February 5, March 5, and April 30, 1981. Mike Garth deposited checks, payable to him, in the amount of $5,565.86, $2,302.13, $7,554.54, and $15,947.25, for the sale

of 15, 8, 31, and 67 head, respectively, into the Garth Cattle and Farming account at Amarillo National Bank. The Garth Cattle and Farming account was in the names of Mike Garth and his wife, Mary Lynn Garth. Mike Garth deposited $23,501.79 for the sale of 98 head on May 1, 1981, and on the same day wrote a check for $17,000, payable to Wayne Garth. Another withdrawal from the account on the same date was in the amount of $4,094.36 with the notation that it was for principal and interest on a note. On May 11, 1981, there was a withdrawal in the amount of $1,948.96 from the account for interest on a note issued to Wayne Garth.

Weldon Rainey testified that he met Garth on September 3, 1981, after following up on reported sales to Redd Cattle Company and discovering previously unreported sales to Texhoma Live-

stock Commission. Garth furnished him with the settlement sheets from the sales to Texhoma, but offered no explanation to account for the disposition of the sales' proceeds. Special Agent Poff testified that Garth stated that he had not turned over to the FmHA the proceeds from these sales of FmHA mortgaged cattle to the Texhoma Livestock Commis-mission.

(12) Garth argues that all this evidence points to his son having made the sales and that there is no evidence to support a finding that he himself was involved in the sales. Garth, however, was indicted under 18 U.S.C. §2, which holds those who aid or abet the commission of offenses against the United States punishable as principals.[16] From the evidence presented, we conclude

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[16] See note 3 supra.

that a rational trier of fact could have decided that Garth participated in the sales, that the cattle sold were mortgaged to the FmHA, and that Garth intended to defraud the FmHA.

Count Six

(13) The evidence, set out earlier, provides more than an ample basis to support Garth's conviction. In addition, Special Agent Poff testified that Garth admitted that he did not send to the FmHA the proceeds of this sale to Moore County Grain Handling Company.

F.

Garth's final argument, and one that applies to all five counts, is that the evidence does not sufficiently corroborate his admissions to Poff and

Rainey for the admissions to be admissible. The general rule is that "an accused may not be convicted on his own uncorroborated confession." Smith v. United States, 348 U.S. 147, 152, 75 S.Ct. 194 (1954), and it is applicable where "the admission is made after the fact to an official charged with investigating the possibility of wrongdoing, and the statement embraces an element vital to the Government's case." Id. at 155. The corroborative evidence alone need not prove the defendant's guilt beyond a reasonable doubt, nor even by a preponderance, "as long as there is substantive independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that the defendant is guilty." Id. at 156. "(A)lthough 'corroboration is necessary for all elements of the offense established by admissions 'alone,' extrinsic proof

(is) sufficient which 'merely fortifies the truth of the confession, without independently establishing the crime charged ***.'" Wong Sun v. United States, 371 U.S. 471, 489, 83 S.Ct. 407, 418 (quoting Smith v. United States, 348 U.S. at 156).

(14) Armed with this test, we have no doubt that the record contains independent evidence that adequately corroborates the truth of Garth's admissions. Counts One and Six are not even close calls; the independent evidence alone would support his conviction. The independent evidence in Counts Two through Four, however, standing alone, would have been insufficient. This evidence showed only that father and son were partners, that the cattle were purchased by either Wayne or MikeGarth, that the cattle were sold by Mike Garth, and that proceeds from the sales probab-

ly found their way into Wayne Garth's personal account. Nonetheless, the evidence is strong enough to fortify the truth of the confession, which is all that is required.

III. Conclusion

Although we sympathize with the plight of those American farmers who toil under an often crushing burden of debt, we cannot permit this sympathy to condone breaches of the criminal law. While we might like to make a contribution to Farm Aid, we cannot do so here. Finding no reversible error, we affirm Garth's conviction on all counts.

AFFIRMED.

Supreme Court, U.S.
FILED
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No. 85-1430

In the Supreme Court of the United States

OCTOBER TERM, 1985

LAWRENCE WAYNE GARTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that it violated due process to prosecute him under 18 U.S.C. 658 for conversion of property mortgaged to the Farmers Home Administration (FmHA).

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on five counts charging him with conversion to his own use of livestock and crops that were pledged to the FmHA as collateral for outstanding loans, in violation of 18 U.S.C. 658. He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed (Pet. App. A1-A45).

1. The evidence at trial showed that petitioner, a Texas farmer, applied to the FmHA for an emergency loan in 1979. The loan was composed of four promissory notes totalling $1,650,640. A note for $95,130 covered petitioner's

actual production loss during the 1978 crop year. A second note for $169,520 enabled petitioner to pay creditors for farm equipment, seed, fuel, and fertilizer. A third note for $873,090 restructured petitioner's real estate debt. And a fourth note for $512,900 gave petitioner operating and living expenses for the 1979 crop year. Each of these notes was secured by certain chattel property, including livestock and crops that were growing or would be growing in the future. The security agreement provided that petitioner could not dispose of the pledged collateral without notifying the FmHA or giving it the proceeds. Petitioner was required to report all sales of crops and livestock immediately and to provide the FmHA with a settlement sheet. The agreement remained effective until all the loans were paid. The following year petitioner was issued a new loan in the amount of $623,400 to cover his 1980 operating expenses. This loan was covered by the same security agreement. Pet. App. A9-A12.

In October 1980, petitioner sold his seed milo crop, valued at $100,184, and did not report the sale to the FmHA. On three separate occasions in early 1981, petitioner's son, acting on petitioner's behalf, sold 15, 8, and 98 head of cattle for prices ranging between $2,000 and $24,000. He also sold 136 bushels of wheat for $493.68 and deposited the proceeds in his father's account. None of these sales was reported to the FmHA until 1982 when the Department of Agriculture began its investigation of the matter. Pet. App. A12-A15; Tr. 149-151; GX 9.

At trial, petitioner did not dispute his failure to report the above sales. No witnesses testified on petitioner's behalf, and petitioner introduced no evidence showing how he had used the proceeds of the unreported sales. Pet. App. A15-A16.

2. The court of appeals affirmed petitioner's convictions on all counts (Pet. App. A1-A41). The court rejected (*id.* at A16-A18) petitioner's claim that he could not be prosecuted for conversion because he is a member of the plaintiff class of farmers in *Coleman* v. *Block*, 580 F. Supp. 194 (D. N.D. 1984). A decree entered by the district court in the *Coleman* case barred the FmHA from foreclosing on farmers without adequate notice and hearing. In this case, the court of appeals held that the civil relief granted by the court in *Coleman* was completely irrelevant to the issue of petitioner's criminal liability. The court explained (Pet. App. A18): "In effect, [petitioner] asks us to read *Coleman* as having decriminalized behavior prohibited by 18 U.S.C. 658. *Coleman* did nothing of the sort, nor could it have done so."

3. Petitioner renews (Pet. 8-15) his contention that his convictions cannot stand in light of the decision in *Coleman* v. *Block*. This contention is without merit.

The issue in *Coleman* was whether the FmHA procedure for determining that loans should be liquidated because they were in default comported with due process. The court held that the existing procedure did not comport with due process because it did not give the farmer an opportunity to contest the liquidation decision on administrative appeal before the liquidation procedure was commenced. In particular, the court found that FmHA's practice of declining to release liens in order to recover its security *before* notifying farmers of their right to appeal had the practical effect of denying them the opportunity to appeal because the farmers were pressured economically to liquidate their farms. *Coleman* focused entirely on the civil issues involved in liquidation and foreclosure. It did not discuss criminal sanctions for conversion or in any way alter the borrower's obligation to report immediately to the FmHA the sale of any crops or livestock pledged as security for outstanding loans—a requirement that the *Coleman* court specifically

noted (580 F. Supp. at 199). In short, *Coleman* does not call into question the criminal culpability of farmers who convert pledged property to their own use without notifying the FmHA.

Petitioner's contention appears to be that *Coleman* excuses his conversion here because, as in *Coleman,* the FmHA "froze his income stream" without due process of law, and he was therefore required to use self-help to prevent this violation of his constitutional rights. At the outset, we note that the record does not supply the factual predicate for this contention. Petitioner introduced no evidence at trial showing either that the converted proceeds were spent on necessary living and farming expenses or that the FmHA refused to grant petitioner additional loans. Thus, the record does not show that the criminal conversion was undertaken to preserve petitioner's basic necessities against a freezing of his income stream. And petitioner does not even allege that foreclosure proceedings were commenced against him—the situation involved in *Coleman.*

In any event, the allegation that the FmHA subsequently refused to lend petitioner more money is entirely irrelevant to the conversion prosecution. If the FmHA's decision in this regard was legally flawed, petitioner's remedy is a civil one; he cannot justify the clearly criminal conduct of secretly converting to his own use the property that was pledged as collateral for his loans. By the same token, petitioner's allegation that he used some of the proceeds from those sales to pay his necessary living and farm expenses does not excuse him from reporting the sales to the FmHA. The regulations governing petitioner's loans state that the borrower is "strictly accountable to FmHA for the proper use of proceeds from the sale of security." 7 C.F.R. 1962.17. Whether or not the farmer intends to use the proceeds for living or farming expenses, he is obligated to

report the sales to the FmHA, which can then consider how the proceeds should be applied. Nothing in *Coleman* suggests that this requirement is constitutionally suspect, and it is clear that petitioner violated 18 U.S.C. 658 by ignoring this reporting requirement and converting the proceeds to his own use.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

APRIL 1986

DOJ-1986-04